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In the Supreme Court of the United States

OCTOBER TERM, 1984

GETTY OIL CO., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner challenges the findings below that it violated the now-repealed petroleum price control regulations, contending that the Department of Energy gave it an inadequate opportunity to raise evidentiary issues; that the Department lacked the authority to assess prejudgment interest; and that the Department mischaracterized the nature of petitioner's petroleum transactions.

1. In May 1973, petitioner and Standard Oil of Ohio (Sohio) entered into an exchange agreement that was to run until January 1, 1977. Under the terms of the agreement, petitioner agreed to sell Sohio 25,000 barrels per day of domestic crude oil, while Sohio sold petitioner 25,000 gallons per day of foreign crude oil. The price that petitioner would pay for the foreign oil was set at the amount that Sohio would pay for the domestic crude, less the difference between the May 1973 prices of domestic and foreign oil.

Pet. App. 3a.[1] The effect of the agreement —which provided both parties with oil at the place where it was needed — was a barrel-for-barrel exchange of foreign for domestic oil with a cash differential paid to petitioner.

In late 1973, price controls were imposed on the sale of domestic crude oil. See 10 C.F.R. Pt. 212 (1977).[2] The regulations in effect during the period relevant to this case established a maximum ceiling price for domestic crude oil (10 C.F.R. 212.73(a) (1977) (reprinted at Pet. App. 183a)), and defined "price" to include "any consideration for the sale of any property or services * * * regardless of form." 10 C.F.R. 212.31 (1977) (reprinted at Pet. App. 183a). With the advent of controls, the price that petitioner could charge for its domestic oil was regulated. The price of foreign oil was not controlled, however, and the value of such oil increased dramatically during the life of the agreement between petitioner and Sohio (see Pet. App. 4a, 16a). As a result, it is undisputed that petitioner sold the foreign oil that it received from Sohio in exchange for its domestic oil for a price that far exceeded the amount that lawfully could have been charged for that domestic oil (*id.* at 4a).

On August 1, 1975, the Department[3] issued a notice of probable violation to petitioner, indicating that it had

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[1]While the agreement was embodied in two documents, the contracts " 'were coextensive in duration, expressly related to each other in respect to price, volume, term and termination, negotiated at the same meeting and executed on the same date' " (Pet. App. 3a-4a, quoting *Getty Oil Co.* v. *Department of Energy*, 569 F. Supp. 1204, 1209 (D. Del. 1983)). The district court in this case accordingly found that petitioner and Sohio "would not have executed one contract without concurrently executing the other" (Pet. App. 4a). See *id.* at 5a.

[2]On January 28, 1981, price controls were removed from crude oil and refined petroleum products. Exec. Order 12287, 46 Fed. Reg. 9909. The Emergency Petroleum Allocation Act of 1973 itself expired on September 30, 1981. 15 U.S.C. 760[illegible]

[3]The term "Department" is used to refer to the Department of Energy and its predecessors in the administration of the petroleum price control program, the Federal Energy Administration and the Federal Energy Office.

reason to believe that petitioner's agreement with Sohio violated the price control regulations. On August 12, 1976, after considering petitioner's response, the Department issued a remedial order charging petitioner with violations of the regulations. See Pet. App. 17a. Following extended proceedings and a hearing, petitioner's appeal of this order was rejected by the Department's Office of Hearings and Appeals (see *id.* at 17a-18a). Petitioner was ordered to repay some $84 million in overcharges, including prejudgment interest (*id.* at 126a).

The Department's decision was upheld by the United States District Court for the District of Delaware, which, after a recomputation of the overcharges, directed petitioner to pay just over $133 million (Pet. App. 11a-50a). The district court included prejudgment interest in this award, noting that "the amount owed is measured by the amount by which the wrongdoer is unjustly enriched" (*id.* at 39a), and finding that the amount of the claimed overcharges in this case was readily ascertainable (*id.* at 45a-50a). This decision in turn was affirmed by the Temporary Emergency Court of Appeals. That court rejected a number of evidentiary and procedural arguments raised by petitioner, noting that petitioner itself had conceded that no material facts were in dispute (*id.* at 7a-8a). The court of appeals also upheld the Department's conclusion that the transfer of Sohio's foreign crude amounted to "consideration" for petitioner's domestic oil, because "[i]n a bilateral contract, which exists here, the promise by one party is the consideration for the promise by the other party" (*id.* at 6a). Finally, the court of appeals endorsed the district court's holding that petitioner was liable for prejudgment interest (*id.* at 10a).

2. Petitioner has alleged a number of procedural and evidentiary flaws in the administrative proceedings in this case: petitioner principally contends that the Department

relied on ex parte evidence and improperly denied petitioner discovery, cross-examination rights, and an evidentiary hearing. Pet. 12-18. These contentions are beside the point, however, because there simply were no factual issues to be resolved below. As the district court noted, "[t]he liability issues are legal ones: What is the substance of the contractual arrangements which the parties entered and what should the consequences be given the congressional intent behind the Mandatory Petroleum Pricing Program?" Pet. App. 35a. Indeed, petitioner itself withdrew its request for a hearing before the Department, and it was unable to point to any disputed factual issues before the Department (see *id.* at 34a), the district court (*ibid.*), or the court of appeals (*id.* at 7a-8a).[4] Petitioner's procedural contentions therefore lack substance.[5]

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[4]Petitioner suggests that the nature of Sohio's intent in entering into its agreement with petitioner is a factual issue that should be explored (Pet. 7, 15), asserting that Sohio's "intent is now admitted to be relevant" (*id.* at 15). This contention plainly is incorrect. As the district court observed, "there is no dispute here about what [petitioner] and Sohio agreed to; there is no ambiguity in the language of the contract which needs to be clarified by parol[] evidence. * * * The subjective intent of Sohio simply does not assist in resolving [the issues in the case] and it is apparent from the decision of [the Department's Office of Hearings and Appeals] that the result would have been no different * * * even if Sohio had reported on and accounted for the transaction in a ma[nn]er contrary to the position which it took in this proceeding." Pet. App. 35a.

[5]Even on their own terms, petitioner's allegations of procedural infirmity are insupportable. The district court found that there were no material omissions from the administrative record, so that the Department's decision was not affected by extra-record evidence (Pet. App. 39a-42a). In any event, Congress specifically exempted the Department's administration of the petroleum price control program from most of the requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). See Section 207(a) of the Economic Stabilization Act of 1970, Pub. L. No. 92-210, 85 Stat. 747. Petitioner's arguments, which principally rely on cases interpreting the requirements of the Administrative Procedure Act (see cases cited at Pet. 12-17), therefore would have no application in this case even were there factual issues in dispute.

Petitioner's challenge to the award of prejudgment interest is similarly without merit. Despite petitioner's argument to the contrary (Pet. 18), the regulation in effect during the administrative proceedings below authorized the Department to remedy overcharges by ordering repayment *and* by "tak[ing] such other actions as the [Department] determines [are] necessary to eliminate or to compensate for the effects of a violation." 10 C.F.R. 205.195(a) (1977). Because this remedy is restitutionary in nature (see *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982)), it necessarily authorizes the award of interest; as the district court noted, "the amount by which the wrongdoer is unjustly enriched * * * includes the value of the beneficial use of the money prior to disgorgement" (Pet. App. 39a). See *Bonray Oil Co.* v. *Department of Energy*, 472 F. Supp. 899 (W.D. Okla. 1978), aff'd, 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).[6] Petitioner's further contention — that the award of interest was inappropriate because the amount of damages claimed is uncertain (Pet. 19) — plainly is incorrect: even if the case with which the damages may be calculated otherwise were relevant, here both the volume and market value of the foreign crude acquired by petitioner is readily ascertainable. See Pet. App. 45a-46a.

Finally, petitioner is incorrect in asserting (Pet. 19-26) that the Department held it liable by retroactively applying 10 C.F.R. 212.82 (1979) (see 43 Fed. Reg. 59820 (1978)), which defines certain exchange transactions for purposes not relevant here. In fact, petitioner was found under 10 C.F.R. 212.73(a) (1977) to have violated the price control regulations by receiving valuable foreign crude as "consideration" for its domestic oil. See Pet. App. 53a. In reviewing

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[6]Because the Department's power to order the payment of prejudgment interest derives from its statutory authority to order restitution, the validity of subsequent amendments to 10 C.F.R. 205.195 (1977) — which are challenged by petitioner (Pet. 18) — is simply beside the point.

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this decision, both courts below found that petitioner's arrangement with Sohio amounted to a single unified transaction (*id.* at 6a-7a, 19a-20a), with "Sohio's foreign crude fit[ting] comfortably within the common law concept of consideration" (*id.* at 21a; see *id.* at 6a-7a). Given the Temporary Emergency Court of Appeals' "intimate[] familiar[ity] with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), these conclusions —which properly looked to the substance rather than to the form of the Sohio transaction (see *Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979); *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied, 406 U.S. 976 (1972)) — do not warrant further review.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[7]Petitioner's similar contention that "the time period of alleged price violation was enlarged by 15 months after [petitioner's] opportunity to respond had expired" (Pet. 15-16) also is without merit. The August 1975 notice of violation was open-ended, alleging violations for the period "between October 1973 and the current time" (see Pet. App. 17a). In any event, petitioner had notice of and in fact responded to the Department's theory of the case, which did not vary from one period to another. The court of appeals therefore concluded that petitioner "was not prejudiced in the least by the addition of the later time period" (*id.* at 9a-10a).

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